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E. J. Jeremy v. Angel Bertagnole and Leo M. Bertagnole; Summit County; and Morgan County : Appellant's Petition for Re-Hearing and Supporting Brief

Utah Supreme Court

Harley W. Gustin; Attorney for Plaintiff and Appellant;

6216

Case No. 6216

In the Supreme Court
of the State of Utah

E. J. JEREMY,
Plaintiff and Appellant,

vs.

ANGEL BERTAGNOLE and LEO M. BERTAGNOLE,
Defendants and Respondents,

and

SUMMIT COUNTY, a municipal corporation,
Intervener and Respondent,

and

MORGAN COUNTY, a municipal corporation,
Intervener and Respondent.

APPELLANT'S PETITION FOR RE-HEARING AND SUPPORTING BRIEF

HARLEY W. GUSTIN,
Attorney for Plaintiff and Appellant.

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APPELLANT'S PETITION FOR RE-HEARING AND SUPPORTING BRIEF

Comes now E. J. Jeremy, the plaintiff and appellant above named, and files this his petition for re-hearing in the above entitled matter, and for a re-examination of the record, the same to be considered in connection with his assignments of error heretofore filed herein

with the points wherein and hereby it is alleged, the court has erred as follows:

1. The court has failed to state its "reasons" for its decision.

2. The court has ignored the Assignments of Error.

3. The court has failed to give effect to the burden of proof.

HARLEY W. GUSTIN,
Attorney for Plaintiff and Appellant.

CERTIFICATE.

The undersigned hereby certifies that he is the counsel for appellant and that in his opinion there is good reason to believe the judgment herein is erroneous and that the same ought to be re-examined.

DATED this 25th day of September, 1941.

HARLEY W. GUSTIN,
Attorney for Plaintiff and Appellant.

BRIEF OF AUTHORITIES RELIED UPON.

The court has failed to state its "reasons" for its decision.

The Constitution of the State of Utah, Section 25, of Article VIII, makes it mandatory for the court to state its reasons for its decision. The section is as follows:

> "When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the *reasons* therefor shall be stated concisely in writing, signed by the judges concurring filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom, may give the *reasons* of his dissent in writing over his signature." (Italics ours).

We think it must be conceded that the Constitutional provision is to be given its ordinary, practical and common sense meaning and that the statement of the *reasons* means a statement of the circumstances or proof, facts or motives which *generate conviction. McKenna v. White,* 192 N. E. 84, (Mass.)

The court has not stated the reasons, as so defined, for the conclusion that it arrives at. The opinion does not point out where the fact of the alleged abandonment, dedication or user of the road in question is found in the record, such as would require the forfeiture or loss of the property right involved, except by speculation and conjecture. With all of the emphasis that we can suggest, and yet with the utmost deference to this learned court's opinion, we contend that it is not enough for the court to say that it agrees with our statement of fundamental rules of law and then to say:

> "We are of the opinion that the evidence supports the findings of the trial court as to user of the road, that under the law of this jurisdiction the court did not err in decreeing it to be dedicated as a public way nor in fixing its width as by the decree provided."

We are entitled to know and to have the opinion state the evidence that the court says is in the record that supports the findings of the trial court. The court says:

> "Twenty-eight witnesses were called by defendants who testified to the nature of the road and to the use thereof which they had observed, as well as the use which they had themselves made of the road. With respect to the use thereof for herding sheep and cattle, William Archibald testified that he observed sheep and cattle using it in the early seventies. He worked out poll tax on the road forty years ago. Use of the road by sheep made work on the road necessary."

The expression quoted is the closest approach found in the opinion to a statement of an evidentuary fact. Does the court intend to hold that Archibald's observation of sheep and cattle using the road in the early seventies justifies a decree that takes private property for a public use without compensation? Is it controlling to say that Archibald worked out a poll tax forty years ago because of debris in the road resulting from the traffic of livestock? The sheep and cattle that Archibald says that he saw forty years ago might have been and probably were the sheep and cattle of the father of appellant and the predecessor in interest. Archibald's testimony, we believe, is fairly abstracted at pages 118-119 of our Abstract of the Record as follows:

> "I am 88 years old and reside in Salt Lake City. I spent the greatest part of my life in Summit County at Snyderville. I was well acquainted with the East Conyan road until about

the last eighteen years. *There was a road there in 1869 or what you would call a trail. If you got on a bad place, you would hold the wagon up on the one side and get off when you could and if you didn't tip over and the wagon was on top of you, you were all right.* I could determine from the road that other wagons had gone up and down there. I next saw the road in 1872. Around 1874, I observed little bands of sheep and cattle coming in from Salt Lake County and using the road. For many years, I worked for the state in the Fish and Game Department and had to do with the planting of fish on East Canyon. I owned a sawmill at the mouth of Bear Creek. The lumber was hauled and marketed at Park City, and it went out over the East Canyon road. There was an old mill at Maxfield's. A man by the name of Sousta ran sheep down there from property leased from George A. Lowe. This was in '84 or '86. He used to drive his sheep back and forth over what is now the Jeremy property. Around 1895 or '96, I was a County Commissioner for Summit County. The county didn't spend much money and there was quite a question between Summit County and Morgan County as to the boundary line. We didn't bother much with the road, but Morgan County put in a bridge. I remember work being done on the road to pay the poll tax. This was a little over forty years ago.

CROSS EXAMINATION.

We did work on the road to pay the poll tax and to also help in getting the lumber out. When the road got slippery, a goose couldn't stand on it if its feet were webbed and the sheep going along there had always filled the upper end. When I refer to the Jeremy ranch, I am referring to the father of Ethan Jeremy. He and I were good friends. *I do not know whose sheep I saw there when I was in the country.''* (Italics ours).

If the case is to be decided upon the testimony of Archibald and treated as the "reason" why the court affirmed the decree of the trial court, then it must be said that the decision itself is contradictory because the court says:

> "True, such testimony does not reveal that any witness used the road at weekly, monthly, or even yearly intervals over a period of ten years; but from the evidence adduced the *inference* is clearly a reasonable one that the road was used for the driving of cattle and sheep for a number of years in excess of that required, *whenever it was necessary or convenient for the members of the public who were engaged in raising or herding stock to so use it.*" (Italics ours).

As hereinabove indicated, the testimony of Archibald does not show user of the road sufficient in time or in law to support the conclusion arrived at. We respectfully *request* the court to point out the or other evidence that it says is in the record to substantiate its conclusion. A critical analysis of the decision might easily suggest that Archibald's testimony was the strongest testimony that the court could find and we submit that its insufficiency is apparent.

Apparently, this court is committing itself to a doctrine which is wholly incompatible with the protection of private interests and private property rights. The court is permitting property to be taken from Mr. Jeremy by merely *inferring* an adverse user without stating what fact or group of facts gives rise to the

inference. We suggest that it is not sufficient under the Constitutional provision to say:

> "It would unduly extend this opinion to set out the evidence in support of the finding of the trail court to this effect (the inference). Suffice it to say that it was sufficient."

The reason why it was sufficient must be stated; otherwise, what use is a written decision? And we submit that in the decision of the court as it now stands there is nothing of value as a precedent. There is nothing stated by way of any analysis of fact that can be used as a criterion for the proposition that a public road of the width declared, has been fixed by dedication, abandonment or user. We are entitled to know the reasons that prompted the court in affirming the trial court's decision and the logic behind the same.

The court has ignored the Assignments of Error.

The assignments all go to the question of the insufficiency of the evidence to support the judgment and decree of the trial court. The situation requires the court to analyze the entire record. The court says in effect that Archibald's testimony is not sufficient to support the findings and yet makes no reference to the testimony of any other witness, except by indirection, if even that can be said.

In order that a thing can be inferred or presumed there must be something to base the inference or presumption upon. The mere fact that twenty-eight wit-

nesses were called by the defendants and interveners does not supply the missing link, nor does the number of witnesses justify the court in the indulgence of an inference. In order that the assignments of error in this case be properly ruled upon, the court must, if necessary, extend the opinion sufficient to set out the evidence that supports the findings. To say that "it would unduly extend this opinion to set out the evidence in support of the finding of the trial court to this effect," and then to follow with the comment that: "Suffice it to say, it was sufficient" is to ignore our assignments of error and to result in an opinion that is wholly without value to anyone, and in particular to indicate that justice has not been meeted out to the parties litigant. The decision, as it now stands, means nothing to a person familiar with or not familiar with the record. It has no value as a precedent.

The court, in the exercise of its appellate jurisdiction, must pass upon the assignments of error, if the error is properly assigned. If the assignments of error, in form, do not raise a reviewable issue, the court should so state. If they do raise a reviewable issue, then the litigants, the bench and the bar in general are entitled to know that each assignment has been exhaustively reviewed. In this case, the only way that the assignments of error can be exhaustively reviewed, and *the fact* indicated, is for the court to point out the evidence that supports the findings of the trial court.

The court condenses its idea of appellant's contention as follows:

> "As hereinabove stated, his (the appellant's) objection to the judgment below, and the findings upon which it is based, goes to the use of the way by any traffic to a greater width than 16 feet and to any use for the purpose of trailing or driving sheep or other herds of livestock."

and the court states its premise in the following language:

> "It is clear from the evidence *that if* the finding of the court to the effect that the road had been continuously used for more than the requisite period to establish dedication for the driving and trailing of herds of cattle, horses, and especially sheep along it, the width of five rods fixed by the court as the width which is reasonably necessary for the public convenience, travel, and use for the purpose for which the public use (have used) the same is not excessive. We shall hereafter refer to the evidence adduced as to the use of the road for the purpose of driving stock." (Italics ours).

The court agrees that a bridle path abandoned to the public may not be expanded by court decree into a boulevard, but the point is that the court did expand, according to our contention, a bridle path into a boulevard and we say, with all due respects, that the trial court did it without any evidence to justify its action.

This court specifically refers to the trial court's finding and in part analyzes the same as follows:

> "By its findings of fact the trial court found that the road in question is, and for more than

> 60 years has been, a well traveled, worked, and defined public road, the center line of which is by the findings particularly described; that said road forms a part of the public road system of Summit and Morgan Counties and of that of the State of Utah, connection with State Highway U. S. 305 on the north and with State Highway U. S. 40-530 on the south; that it is, and had been for 60 years, continuously used by ranchmen, stockmen, owners of land contiguous and adjacent thereto, and by the public generally for all necessary and convenient purposes, including pedestrian, equestrian, and vehicular traffic, and the driving and trailing of horses, cattle and sheep and herds of each along the same; and 'that by reason of such use said road has been dedicated and abandoned to the public as a public road.' "

The quotation next above is a summary of several individual findings based on the theory respectively of dedication, abandonment and user. We say that as an expression of the thing pointed out invoking the jurisdiction of this court, the evidence is not sufficient to support either a dedication, abandonment or a user of the road in question to the width fixed by the trial court.

Even a casual inspection of the road will demonstrate that the road has never been used to the width declared and that it is physically impossible to lay out, to construct, or to maintain such a boulevard in that mountainous region.

The court has failed to give effect to the burden of proof.

The defendants and interveners attempted to justify their position, after conceding that Mr. Jeremy was the owner of the property, by saying that he had lost a property right by dedication, abandonment or user. The defendants asserted an affirmative right. The trial court compromised the situation by giving them three rods less than the eight rods that they asked for. We say that the defendants and the interveners did not evidence their contentions by a preponderance of the evidence or by any evidence.

Our original brief goes into the proposition of the weight and quantum of evidence required to justify a taking of private property for a public purpose without compensation. It is consistently held, as a fundamental rule, that property cannot be taken from an individual for public use without compensation, unless it is shown, by clear and convincing evidence, that the individual has lost his right of enjoyment or possession by some act or negligence of his own. The importance of an adherence to these fundamental rules is recognized by the court and there is no difference between us on the same.

We do differ, however, on the application of those rules to the case at bar. The "inference" does not satisfy the quantum of proof required. The positive evidence in the record of a permissive use, either by way of a gratuity or for compensation, destroys the probative value of any presumption or inference that might otherwise be indulged in. The very nature of this appeal and the controversy presented by the record requires the

court to point out where the evidence justifies the findings and how and in what manner the defendants and interveners have sustained the burden of proof. The record does not show a dedication, abandonment or a use for the required period of time of a five rod road in favor of the public.

The court has misapplied the rule announced in the cases of *Lindsay Land & Livestock Co. v. Churnos,* 75 Utah 385, 285 Pac. 646, and *Whitesides v. Green,* 13 Utah 341, 44 Pac. 1032. These cases involve a factual situation that disclose to the reader of the opinion the propriety of the conclusion arrived at by this court. The two cases differ in fact but do not differ in the fundamental rules of law relied upon. Upon an analysis of the two cases, it will be seen that the party litigant asserting the affirmative had ample evidence to justify the reason based upon facts to germinate this court's decision as announced. In each of the cases mentioned, the court did prolong its decision by stating the facts involved, which are wholly different, as a reading of the two decisions, will disclose.

The court does not take into consideration the fact that the "public" does not use Mr. Jeremy's property for the trailing of sheep; nor does it take into consideration that the public at large is not concerned with the trailing of sheep. Here the Bertagnoles, being the nearest neighbor to the north, are the only ones that find it convenient to trail sheep over Mr. Jeremy's property rather than to go a few miles out of their way and thus

traverse existing sheep trails. The record shows that the existing sheep trails that would avoid the Jeremy property have been used for livestock purposes as differentiated from vehicular travel to avoid a trespass upon private and individually owned property.

CONCLUSION

The court in its present decision says in effect that the findings of the trial court on questions of fact should be sustained without a review of the evidence to support the same, if any. The court in effect agrees with our enunciation of fundamental principles. The whole decision resolves itself into the use of language in a most generic way, and leaves the reader of the same to speculate as to why and how the court arrived at its decision.

WHEREFORE, it is respectfully prayed that the court ought to re-examine the cause, together with its decision, to the end that this petition for re-hearing be granted.

Respectfully submitted,

HARLEY W. GUSTIN,
Attorney for Plaintiff and Appellant.